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IN THE

Supreme Court of the United States

October Term 1971

MICHAEL A. TOUGHER, JR. and
AMELIA L. TOUGHER, *Petitioners,*

v.

COMMISSIONER OF INTERNAL
REVENUE, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

H. THOMAS KAY, JR., ESQ.
Counsel for Petitioners

2000-745 Fort Street
Honolulu, Hawaii 96813

Of Counsel
CONROY & HAMILTON

2000-745 Fort Street
Honolulu, Hawaii 96813

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MICHAEL A. TOUGHER, JR. and
AMELIA L. TOUGHER, Petitioners,

vs.

COMMISSIONER OF INTERNAL
REVENUE, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 4, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the Tax Court of the United States is reported at 51 T.C. 737 (1969) and is printed in Appendix A attached hereto. The opinion of the Court of Appeals of the Ninth Circuit reported at 27 AFTR2d 71-1301 is printed in Appendix B attached hereto.

JURISDICTION

The judgment of the Court of Appeals of the Ninth Circuit, printed in Appendix B hereto, was entered on May 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

THE QUESTIONS PRESENTED

Did the Ninth Circuit Court of Appeals err in affirming the opinion of the Tax Court that deductions claimed by the taxpayers for food did not constitute "meals" within the meaning of Section 119 of the Internal Revenue Code of 1954 (26 U.S.C. 119).

STATUTES AND REGULATIONS INVOLVED

Sec. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if--

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation. (26 U.S.C. 1964 ed., Sec. 119)

Reg. Sec. 1.119-1 (TD 6220, filed 12-28-56; republished in TD 6500, filed 11-25-60; amended by TD 6745, filed 7-8-64). Meals and lodging furnished for the convenience of the employer.

(a) Meals. -- (1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation." * * *

"(c) Rules. -- (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cow-hands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(d) Examples. -- The provisions of Section 119 may be illustrated by the following examples: * * *

Example (7). A construction worker is employed at a construction project at a remote job site in Alaska. Due to the inaccessibility of facilities for the employees who are working at the job site to obtain food and lodging and the prevailing weather conditions, the employer is required to furnish meals and lodging to the employee at the camp site in order to carry on the construction project. The employee is required to pay $40 a week for the meals and lodging. The weekly charge of $40 is not, as such, part of the compensation includible in

the gross income of the employee, and under paragraphs (a) and (b) of this section the value of the meals and lodging is excludable from his gross income. * * *

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals." (26 C.F.R., Sec. 1.119-1)

STATEMENT OF THE CASE

This case involves deficiencies in income tax for the calendar years 1963 and 1964 in the respective amounts of $354.49 and $320.96. These deficiencies arose through the Commissioner disallowing deductions claimed by the taxpayers for the years 1963 and 1964 in the respective amount of $1,611.34 and $1.534.26 for food purchases at the Federal Aviation Agency commissary on Wake Island.

The Tax Court, in its decision of February 6, 1969, sustained the Commissioner's determination of the deficiencies. An appeal was taken to the Ninth Circuit Court of Appeals to review the decision of the Tax Court. The Ninth Circuit Court

of Appeals in its decision of May 4, 1971 affirmed per curiam the decision of the Tax Court. Jurisdiction to review the decision of the Tax Court was conferred on the Court of Appeals for the Ninth Circuit by Section 7482 of the Internal Revenue Code of 1954, (26 U.S.C. 7482). Tax Court jurisdiction was conferred by Section 7442 of the Internal Revenue Code (26 U.S.C. 7442).

The relevant facts as found by the Tax Court are as follows:

Petitioners, husband and wife, lived on Wake Island in the central Pacific Ocean at the time of filing the petition in this case. They filed joint income tax returns for 1963 and 1964 with the appropriate office of the Internal Revenue Service. The husband will sometimes hereinafter be referred to as petitioner.

During the years at issue, petitioner was an electronic technician employed by the Federal Aviaton Agency (FAA) at its facilities on Wake Island. He worked on electronic systems located at various places on the island. He was on call 24 hours a day, and, while his normal work week was 48 hours, after hour calls occurred about three times a week, resulting in an average work week of 54 hours.

Wake Island is located in the middle of the Pacific Ocean, approximately 2,500 miles from Hawaii and 2,000 miles from Japan. What is commonly referred to as Wake Island is actually three small atolls in the shape of a horseshoe; the largest and center atoll, Wake, is connected to the smaller atolls, Peale and Wilkes, by means of a bridge and a causeway, respectively. As used herein, the term "Wake Island" refers to all three atolls. It is 11 miles long and three miles square; it is flat with the highest point 12 feet above sea level.

Wake Island is a United State possession, used primarily as a refueling station for military and commercial aircraft. Roughly 75 percent of all trans-Pacific air traffic uses Wake

Island for refueling purposes. The island is administered by the FAA pursuant to an agreement with the Secretary of the Interior that all executive, legislative, and judicial authority vested in the Secretary shall be exercised by such persons as may be designated by the administrator of the FAA. Part 165 of the Federal Aviation Regulations is the Wake Island Code. 14 CFR 165. Under the Code, executive authority over the island is vested in the Area Manager of Wake Island. In addition to handling air traffic and aviation communications, the FAA provides a variety of supporting community facilities, including power, water, roads, housing, a commissary store, certain mess facilities, maintenance shops, police and fire protection, public health and medical services, and a school with classes from kindergarten through the ninth grade.

During the years at issue, the population of Wake Island was approximately 1,350, of whom about 290 were FAA employees and about 285 were dependents of FAA employees. About 128 FAA employees lived with their families on Wake Island (such employees are sometimes hereinafter referred to as "accompanied employees"); the other FAA employees either had no families or were not accompanied by them (such employees are sometimes hereinafter referred to as "unaccompanied employees" or "bachelors" regardless of whether they were in fact unmarried). The Wake Island Area Manager preferred to have accompanied persons employed on the island to insure greater continuity of service. The other individuals on the island included persons associated with Pan American Airways, "Standard Oil", the United States Navy, the United States Coast Guard, a Military Air Command contractor from Los Angeles, and the Facilities Management Corporation.

The food facilities on Wake Island included an FAA central dining room or mess hall, an FAA commissary, a Pan American mess for Pan American employees, a Facilities Management Corporation mess for nongoverment employees, a restaurant or snack shop operated privately pursuant to contract in conjunction with a bowling alley ("Al Ching's"), and an air terminal coffee shop (also operated by Al Ching).

The FAA facilities were established pursuant to various public laws and agency policy directives.

Civil Aeronautics Administration[1] Order BU 2500.11, dated February 23, 1951 states in part:

> Accordingly, in order to discharge the responsibilities imposed upon the CAA by Section 10 of P.L. 647 and at the same time to maintain the integrity of funds as appropriated by Congress it shall be the policy of the Civil Aeronautics Administration to:
>
> (1) furnish, preferably through concessionairies, such items, facilities, and services as fall within the scope of Section 10 (a) of the Act; if such items, facilities, and services cannot be furnished through concessionaires they should be provided for directly by the CAA;
>
> (2) charge the users of such items, facilities or services at rates specified in the Federal Register, or, when not specified in the Federal Register, at rates approved by the Washington Office;
>
> (3) on an agency-wide basis; reimburse the S & E, CAA appropriation from which the costs of such additional items, facilities; or services were paid, from funds received as a result of direct sale or charge, with that portion of collections which is equivalent to the cost of such additional items, facilities; or services, incurred pursuant to P.L. 647;

This order was superseded by FAA Order Oa 2500.5, dated February 28, 1964, which provides in part:

1. The Civil Aeronautics Administration (CAA) was the predecessor of the FAA.

4. b. *Public Law 390, 81st Congress provides* that where adequate subsistence supplies are not available from normal sources commissary facilities may be established for the purchase, transportation, storage, and distribution of food and other personal subsistence supplies for resale to employees of the Federal Aviation Agency and other Federal agencies and their dependents in Alaska and other points outside the continental United States. It also provides for the establishment, maintenance, and operation of messing facilities, by contract or otherwise, to provide meal service to employees of FAA and of other Federal agencies and their dependents where suitable family facilities are not available and meals cannot be obtained resonably from commercial sources. According to this law, proceeds from commissary resales and from messing services are to be credited to the appropriation from which the expenditures are made. Public Law 390 also authorizes the furnishing and maintaining of quarters for FAA employees at remote localities not on foreign soil where such accommodations are not otherwise available.

* * * * * * * * * * * * * *

5. b(3) *Commissary, Messing, and Domestic Activities.* Sales prices of goods and supplies at commissaries and rates for messing and domestic services will be established by the cognizant regional director maintained to approximate local or public rates, including applicable consumer taxes for similar items in a representative community within the region where the facilities are located. Based on price surveys conducted at reasonably frequent intervals, and in any event not less than biannually, rates should be adjusted by regional directors as considered necessary.

FAA Regional Order PC-4230.1, effective on February 1, 1961, provides in pertinent part:

3. *General Policy* -- It is the policy of FAA to provide commissary and messing facilities at remote and isolated locations where the Federal Aviation Agency is the prime user and where adequate facilites from other sources are not available.

* * * * * * * * * * * * * *

5. *Commissary*

a. *Use* -- All FAA employees and their dependents stationed at Wake and Canton Islands are entitled to commissary privileges. At the discretion of the Island Manager, use of the commissary may be extended to employees of other Federal Agencies and their dependents. Any further extension must be approved by the Regional Manager. Commissary shall be opened for regular shopping no oftener than three times a week.

b. *Sales Price* -- The sales price of all commissary goods will be set and maintained by the Chief, Commissary, Mess and Domestic Services Section, and will correspond substantially with the prevailing retail prices in Honolulu.

c. *Collection Procedure* -- Payment for commissary purchases will, at the discretion of the Island Manager, be in cash at the time of purchase or on a cumulative monthly basis.

* * *

6. *FAA Dining Room*

a. *Use* -- All Federal employees not occupying family quarters are entitled to eat in the FAA Dining Room. At the discretion of the Island Manager, this privilege may be extended to their guests; to FAA employees occupying family quarters, their dependents and guests; to similar-type employees of other Federal Agencies, their dependents and guests; and to official visitors. Further extention of this privilege must be approved by the Regional Manager.

b. *Collection Procedure* -- The revised per diem structure eliminates the collection for meals served to Sixth Region FAA employees in per diem status. Collections for meals served to FAA employees in bachelor status but not on per diem (includes permanently stationed FAA bachelor employees and most FAA construction workers) will be made by means of payroll deductions ***. Collections from all other dining room patrons will be on a cash basis except that meals served to employees of other agencies and contractors with whom there exist subsistence agreements will be collected through the normal billing process.* * *

c. *Missed Meals* -- Any FAA employee who is subject to payroll deductions for meals may make application for adjustment for any period in excess of five consecutive days during which he is absent from meals.

* * *

FAA Pacific Region Notice PC 4239.1 CH3, dated February 1, 1963, provides in part: "All bachelor-status employees must take their meals at the central dining room."

The FAA furnishes complete meal service at its mess hall to its unaccompanied employees. The cost of the three meals per day to the unaccompanied employees during the years at issue was $1.50 until June 9, 1963, and $1.75 thereafter. This charge was deducted from the pay of unaccompanied employees whether they ate at the mess hall or not, except that an adjustment could be made if more than five consecutive days were missed. Accompanied FAA employees and their dependents could dine at the FAA mess hall at the discretion of the Island Manager, but could not do so on a permanent basis. Food for the mess hall was ordered on the basis of the number of unaccompanied employees to be served, and accompanied personnel could be served only if sufficient supplies were available. On the average of four times a year for periods of one to four weeks, food supplies reached such a low level that mess hall privileges to accompanied personnel had to be suspended. The mess hall prices charged to accompanied employees and their dependents during the years at issue were $1.00 for breakfast, $1.25 for lunch, and $2.00 for dinner.

The only source of food for home consumption that could be purchased on Wake Island was the FAA commissary. It was the equivalent of a small supermarket, offering quality items generally without a choice of brands. Prices at the commissary were fixed so as to equal the average of the prices prevailing at three representative markets in Honolulu plus 3-1/2 percent in

lieu of sales tax (equivalent to the Hawaii sales tax). The commissary was open four hours a day every other day. Payment for items purchased at the commissary was made in cash, either at the time of purchase or on a monthly basis. All residents of Wake Island, whether or not FAA employees, were generally allowed to shop at the FAA commissary, but, as occasionally happened, when supplies became low, shopping privileges were restricted to FAA personnel. FAA studies showed that it was cheaper for it to maintain the commissary than to feed accompanied employees and dependents in the mess hall. Cost studies by private concessionaires showed that it would be "better" to continue to run the commissary as an FAA facility.

FAA employees could dine at the Pan American and Facilities Management Corporation mess halls by invitation only. Al Ching's bowling alley restaurant could accommodate between 35 and 50 persons at one time; the record does not disclose the rate of turnover of patrons or the total number that could be served in a day. Since the restaurant was popular, reservations were necessary to ensure accommodations, and its food supplies at times ran low so that some items on the menu were not always available. If the FAA had closed the commissary and had not permitted accompanied employees to eat at its mess hall, there would not have been adequate facilities on the island to accommodate the accompanied employees and their dependents on a regular, full-time basis. No edible food could be grown on the island.

There was no requirement that accompanied employees purchase their food from the commissary. On a few occasions, petitioner and others on the island joined together to have meat supplies from Hawaii shipped to them at Wake Island. Because of a Federal law regarding meat inspection, the group was unable to continue this plan, and later had meat shipped from California. This method of obtaining meat was used twice by

petitioner during the years at issue, but it was felt that the trouble and expense involved more than offset the benefits derived from the plan. On a number of occasions various employees combined to form their own "co-op", ordering food supplies from Honolulu and the mainland in case lots.

Section 591.203 of the Federal Personnel Manual Supplement provides that a "differential" of 25 percent of basic compensation shall be paid on Wake Island. The same section provides that differentials are based on

> (a) extraordinarily difficult living conditions, (b) excessive physical hardship or (c) notably unhealthful conditions * * *.

Petitioners and their children ate most of their meals at home during the years at issue. The meals were prepared by Mrs. Tougher from food purchased at the FAA commissary. Petitioners ate at the FAA mess three or four times during the years at issue, and on occasion they ate dinner at Al Ching's to break the monotony. Petitioners spent $1,611.34 in 1963 and $1,534.26 in 1964 for items purchased at the FAA commissary. These amounts included food used for items purchased at the FAA commissary. These amounts included food used for the meals of petitioners and their children. Non-food items accounted for about five percent of these figures and included household maintenance items such as soap, ammonia, mops, brooms, and household cleaners, but not items such as toiletries.

On their 1963 joint income tax return, petitioners reported $9,822.43 as wages or salary. An attached schedule stated in part:

Gross Wages reported on W-2 form		$12,507.64
Lodging	$1,073.87	
Food	1,611.34	
Total	$2,685.21	
		2,685.21
Taxable Income		$ 9,822.43

On their 1964 joint income tax return, petitioners reported $14,071.59 as wages or salary. They subtracted $2,674.47 as "Adjustments" in arriving at "Total Income" (adjusted gross income). An attached schedule, similar to that included in their 1963 return, disclosed that the amount of "Adjustments" consisted of $1,140.21 attributable to "lodging" and $1,534.26 attributable to "Food".

In his notice of deficiency, the Commissioner considered as "unallowable deductions" sums for "food purchases" in the amounts of $1,611.34 for 1963 and $1,534.26 for 1964.

REASONS FOR GRANTING THE WRIT

First, the decision of the Court of Appeals for the Ninth Circuit affirming the Tax Court opinion should be reversed because it erroneously interprets Section 119 of the Internal Revenue Code of 1954, thereby further increasing the conflict existing between several of the Circuit Courts as to the correct meaning of said Section 119.

In the instant case we are concerned with whether the food used for sustenance of the petitioners while on Wake Island constitutes "meals" within the intendment of Section 119. There presently is much confusion in the Curcuit Courts as to the manner in which Section 119 should be interpreted. The Eighth Circuit in *U.S. v. Morelan*, 356 F.2d 199, 17 AFTR 2d 286, the Fifth Circuit in *U.S. v. Barrett*, 321 F.2d 911, 12 AFTR 2d 5630, and the Tenth Circuit in *U.S. v. Keeton*, 383 F.2d 429, 20 Appl. AFTR 2d 5688 have all liberally held in cases involving highway patrolmen that cash reimbursements for money spent by the patrolmen while on duty should properly be excluded from gross income as "meals" under Section 119.

In the *Morelan* case the Eighth Circuit stated on page 289 as follows;

> "In regard to the 'in kind' requirement of Section 119, Judge Devitt concludes as follows, at page 884 of 237 F. Supp.:
>
> 'The defendant also urges that Section 119 permits exclusion only where the meals are furnished in kind and not where a cash reimbursement for meals is made. That, too, is straining too much in the interest of efficient tax collection. What is the real difference, for tax purposes, in the employer furnishing a meal or paying for one furnished by another? I see none. A very estimable appellate court has so held, *Saunders v. Commissioner*, 215 F. 2d 768 (771-772) (46 AFTR 600), 3rd Cir. (1954).
>
> 'The nub of the issue is what, in the light of all of the facts, does the $3-per-day allowance represent–expense reimbursement or compensation? The clear answer, as I see it, is expense reimbursement.'
>
> See, also *Williamson v. Commissioner*, 8 Cir., 1955, 224 F.2d 377, 379-381 (47 AFTR 1425), which holds a monetary housing allowance paid to a minister was not part of his gross income. We agree with Judge Devitt, *Saunders v. Commissioner*, 3 Cir., 1954, 215 F.2d 768 (46 AFTR 600), and *Williamson*. It is not clear to this court that Congress did intend, in fact, to require that meals must be provided in kind to qualify under Section 119. It is evident that Section 119 does not in specific terms contain an 'in kind' requirement."

In *Wilson v. U.S.* (CA-1) 24 AFTR 2d 5011, 412 F.2d 694 the First Circuit has reached an opposite conclusion regarding Section 119, holding that cash payments to policemen do not constitute "furnishing a meal in kind." The First Circuit in its opinion cited the Tax Court opinion in the instant case, stating as follows:

> "Turning to the intendment of the statute, when one looks to its purpose there are special reasons for not taking the "value" of meals furnished in kind that do not apply to the receipt of cash payments. Not only is the mechanical difficulty of determining the monetary value of a meal large in comparison with the tax revenue involved, but from the standpoint of the employee the employer's compulsory control of the 'place, duration, value and content of the meal,' Michael A. Tougher, Jr., 1969, 51 T.C. No. 73, may substantially reduce his freedom and enjoyment; and hence its value to him. These practical differences well warrant a difference in tax treatment. We should not, absent some strong reason, seek a construction that removes them."

The purchase of groceries by the petitioners for their sustenance constituted "meals" to them in the same manner that the purchase of meals from public restaurants constituted "meals" to the highway patrolment in the *Morelan*, *Barrett*, and *Keeton* cases. Under the broad interpretation of furnishing meals in kind used by the Fifth, Eighth and Tenth Circuit Courts in those cases, we feel certain that the purchase of groceries through a commissary as required by the employer would constitute the "furnishing of meals" under Section 119. Rather, it appears to us that the Tax Court and the Ninth Circuit Court of Appeals in affirming the Tax Court decision have aligned themselves with the First Circuit in the *Wilson* case, requiring under a narrow interpretation of the statute that neither monetary reimbursement for meals purchased at the public restaurants or food purchased from the employer's commissary qualifies as "meals furnished in kind."

Secondly, the issue presented by this case is of great and recurring significance in the administration of taxation under Section 119 of the Internal Revenue Code. The petitioners are

members of a class of employees employed by the United States government and other employers in remote or isolated areas throughout the world. These employees find themselves in a situation where there is no source of food other than that supplied by their employer, and they have no alternative but to purchase this food from their employer for the convenience of the employer. Many times, as in the instant case, the employer has the absolute control to determine whether the sustenance of its employees should be in the form of prepared food at a dining hall or in the form of groceries purchased through a commissary. As being interpreted by the Ninth Circuit Court, the employee purchasing prepared food receives an exclusion for the cost of the meal under Section 119 while the employee purchasing groceries from the commissary does not.

Because of the conflict between the Circuit Courts and the serious affect of the decision below, if unreversed, upon this class of employees, it is appropriate for the Supreme Court to exercise its discretion in granting a writ of certiorari. See *United States v. Zacks*, 845 S. Ct. 178, 375 U.S. 59, 11 L. Ed. 2d 128.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

H. Thomas Kay, Jr.

H. Thomas Kay, Jr., Esq.

Counsel for Petitioners
2000-745 Fort Street
Honolulu, Hawaii 96813

APPENDIX A

We have determined that it would be more convenient to separately present the opinion of the Tax Court, and have included copies of said opinion pursuant to Rule 23 1. (i.).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL A. TOUGHER, JR., and
AMELIA L. TOUGHER,
Appellants,

v. No. 24,348

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

[May 4, 1971]

Petition to Review a Decision of
The Tax Court of the United States

Before: KOELSCH, CARTER, and KILKENNY, Circuit Judges

PER CURIAM.

In reporting income for the years 1963 and 1964, Taxpayers, Michael A. Tougher, Jr. and Amelia L. Tougher, his wife, deducted from gross income the cost of supplies – principally groceries–purchased by Mrs. Tougher for family use from the Federal Aviation Administration Commissary on Wake Island, where Mr. Tougher was then employed by the F.A.A. as an electronic technician.

The Commissioner disallowed these deductions and determined deficiencies in the Toughers' income taxes resulting from these adjustments. The Tax Court, concluding that the deductions did not fall within the purview of Section 119 of the Internal Revenue Code of 1954 (26 U.S.C. 119), as contended by the Toughers, sustained the Commissioner's determinations *Michael A. Tougher, Jr. and Amelia L. Tougher v. C.I.R.*, 51 T.C. 737 (1969). The Toughers brought the matter here on petition to review the decision of the Tax Court.

We affirm on the rationale of the Tax Court.